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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

CHAUFFEURS, TEAMSTERS & HELPERS LOCAL UNION 795; S. E. SMITH and the agents, servants, employees and attorneys of said defendants,
Petitioners,

v.

RICHARD NEWELL, d/b/a EL DORADO DAIRY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS.

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KANSAS LAW PUBLISHING CO., TOPEKA

INDEX.

	Page
Citations to Opinions Below	2
Jurisdiction	2
How Federal Question is Presented	3
Questions Presented	4
Constitutional Provisions and Statutes Involved	4
Statement	5
Reasons for Granting the Writ	8
Conclusion	19
Appendix A—Statutes and Constitutional Provisions	20
B—Judgment of the District Court	23
C—Opinion of Kansas Supreme Court	27
D—Opinion Denying Rehearing	56

CITATIONS.

CASES.

Amalgamated Meat Cutters, etc., v. Fairlawn Meats, 353 U.S. 20, 77 S. Ct. 604 9

Bakery & Pastry Drivers, etc., v. Wohl, 315 U.S. 769, 62 S. Ct. 816 ..... 14, 18

Cafeteria Employees Union, etc., v. Angelos, 320 U.S. 293, 64 S. Ct. 126 ..... 14, 17, 18

Garner v. Teamsters Union, 346 U.S. 485, 74 S. Ct. 161 9

Guss v. Utah Labor Relations Board, 353 U. S. 1, 77 S. Ct. 598 ..... 9, 10, 12

Local Union No. 6, etc., v. Graham, 345 U. S. 192, 73 S. Ct. 585 14

Milk Wagon Drivers Union, etc., v. Meadowmoor Dairies, 312 U. S 287, 61 S. Ct. 552 ..... 14, 17, 18

CASES—(Continued)

Page

National Labor Relations Board v. Fainblatt, 306 U. S. 601, 59 S. Ct. 588 ..... 9, 10, 12

National Labor Relations Board v. Denver Building and Construction Trades Council, 341 U. S. 675, 71 S. Ct. 675 9

Polish National Alliance, etc., v. National Labor Relations Board, 332 U. S. 643, 64 S. Ct. 1196 ..... 9, 10-11, 13

San Diego Building Trades Council v. Barmon, 353 U. S. 27, 77 S. Ct. 607 9

Thornhill v. State of Alabama, 310 U. S. 88, 60 S. Ct. 736 ..... 14, 15, 18

Weber v. Anheuser-Busch, Inc., 348 U. S. 468, 75 S. Ct. 480 9

Wickard v. Filburn, 317 U. S. 111, 63 S. Ct. 82 13

Youngdahl v. Rainfair, Inc., ... U.S. ..., 78 S. Ct. 206 ..... 17, 18

UNITED STATES CONSTITUTION.

Article VI, clause 2 11

Amendment I. 15

Amendment XIV, section 1 15

STATUTES.

28 U.S.C., section 1257 (3) 3

29 U.S.C., section 152 8

29 U.S.C., section 160 9

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RICHARD NEWELL, d/b/a EL DORADO DAIRY,
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS.

Petitioners Chauffeurs, Teamsters & Helpers Local Union 795, hereinafter called the Union, and S. E. Smith, a business agent of the Union, pray that a writ of certiorari issue to review the judgment of the Supreme Court of Kansas entered in the above entitled case on November 9, 1957, and the order denying the petition for rehearing therein, which order was entered December 18, 1957.

CITATIONS TO OPINIONS BELOW.

The opinion of the District Court of Butler County, Kansas, is unreported. That opinion, in the form of a journal entry of judgment, incorporates a permanent injunction against petitioners. The journal entry of judgment (R. 128) is printed as Appendix B, hereto, *infra*, p. 23. The decision of the Supreme Court of Kansas, modifying in part, and as modified affirming, the judgment of the District Court of Butler County, Kansas (R. 171), is reported in 181 Kan. 898, 317 P. 2d 817, and is printed as Appendix C, hereto, *infra*, p. 27. The decision of the Kansas Supreme Court denying petitioners' motion for rehearing (R. 238) is unreported in the official Kansas advance sheets. It is reported in 319 Pac. 2d 171, and is printed as Appendix D, hereto, *infra*, p. 56.

JURISDICTION.

The judgment of the Supreme Court of Kansas, modifying, and as modified affirming, the judgment of the District Court, was rendered November 9, 1957, (R. 171, Appendix C, *infra*, p. 27) December 18, 1957, petitioners' motion for rehearing was denied (R. 238, Appendix D, *infra*, p. 56). The federal questions here presented were timely raised in petitioners' answer in the District Court (R. 17), in their appeal to the Supreme Court of Kansas (R. 143), and in their motion for rehearing (R. 190). These federal questions were decided adversely to petitioners by the District Court and by the Kansas Supreme Court. The jurisdiction of this Court is invoked under

28 U.S.C. Section 1257 (3), (Appendix A, *infra*, p. 22), because rights, privileges and immunities specially set up and claimed under the Constitution and statutes of the United States have been denied.

HOW FEDERAL QUESTION IS PRESENTED.

Petitioners' answer affirmatively alleged that their conduct was protected under Article I, Section 8, and Article VI of the Constitution of the United States, the First and Fourteenth Amendments to the Constitution of the United States, and that jurisdiction had been preempted by the Labor-Management Relations Act of 1947, as amended (R. 19). These contentions were rejected by the District Court of Butler County, Kansas (R. 136, Appendix B, *infra*, p. 23).

Upon appeal to the Supreme Court of Kansas, error of the District Court in concluding that interstate commerce was not involved was specified (R. 143) and urged. Error in enjoining from unlawful means, and in permanently enjoining all picketing was specified and urged (R. 144). The Kansas Supreme Court rejected each of these propositions and decided each of them against petitioners (R. 171, Appendix C, *infra*, p. 27). Upon motion for rehearing these propositions were again urged by petitioners (R. 190) and again decided adversely to petitioners (R. 238, Appendix D, *infra*, p. 56).

QUESTIONS PRESENTED.

I.

Where a labor dispute exists, within the meaning of 29 U.S.C., sec. 152 (9), in an industry engaged in or affecting interstate commerce, but where the volume of interstate commerce is not great, does the maxim of *de minimus non curat lex* operate to divest the National Labor Relations Board of jurisdiction and reinvest the state with jurisdiction?

II.

May the Kansas Court issue a blanket injunction forbidding all picketing and depriving petitioners of their constitutional rights to freedom of speech and freedom of assembly, simply because photographs were taken in connection with the picketing, the single word "damn" was heard by respondent, and there was evidence of a secondary boycott which was not connected with the picketing?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The First and Fourteenth Amendments to the Constitution of the United States, and Article Six, paragraph two thereof, are involved. Also involved is the Labor Management Relations Act, 1947, as amended (29 U.S.C. 15 1, et seq.), particularly 29 U.S.C. sections 152 (6), and 160 (a). Because these provisions are lengthy they are printed as Appendix A, hereto, *infra*, p. 21.

STATEMENT.

Respondent is the owner and operator of the El Dorado Dairy, doing business in El Dorado, Kansas (R. 22). Respondent's annual gross sales were approximately $100,000.00 (R. 22) and the annual gross purchases approximately $72,000.00. (R. 135) From outside the State of Kansas respondent purchased supplies of the value of $100.00 per month (R. 119). His dairy equipment was manufactured outside of Kansas but purchased locally (R. 44). Respondent had purchased locally two trucks (R. 45) and an adding machine (R. 117) which had been manufactured outside of Kansas.

Respondent employed only three truck drivers: wholesale route driver (Hodgens); a retail route driver (Church) and a relief driver (Grant). (R. 22, 24). These three men, in July, 1955, authorized petitioner Teamsters, Chauffeurs & Helpers Local Union No. 795, hereinafter called the union, to represent them for collective bargaining purposes (R. 123).

Petitioner S. E. Smith, as business agent of the Union, notified respondent of this authorization on July 15, 1955 (R. 23). At that time Smith requested a meeting with respondent for the purpose of negotiating a collective bargaining contract (R. 126).

Respondent received this notification July 16, 1955 (R. 23). Thereafter he transferred the relief driver to inside work (R. 100), fired the retail driver (R. 24), and took the wholesale driver for a ride, but did not

discuss the notice he had received from Smith (R. 111). Respondent then notified Smith that he would discuss the drivers and helpers with Smith (R. 23, 146).

When petitioner Smith met with respondent in El Dorado (R. 27), Smith requested that the retail driver be put back to work and that Newell recognize the union and enter into bargaining negotiations, but Newell refused (R. 28, 29, 30, 125). A second, and equally unsuccessful, meeting was had on July 23, 1955 (R. 126). Thereafter the three employees met with Smith and decided to go out on strike (R. 126).

On Monday morning, July 25, 1955, the three employees began peaceful picketing in front of respondent's place of business (R. 32). Picketing was carried on from 8:00 a. m. until 5:30 p. m. daily, except Sunday, by one employee at a time walking back and forth in front of the dairy about two feet from the curb (R. 33, 84). The legend on the banner carried by the picket read:

> "This establishment on strike. Teamsters Union Local 795, Wichita." (R. 33)

Literature was handed out by the pickets to respondent's retail customers and some was left in stores handling respondent's products (R. 33). This literature simply informed the public of petitioners' position (R. 25, 27, 28, 147). The pickets took photographs of persons entering and leaving the dairy (R. 36). There was also some pretended picture taking (R. 94). Respondent testified that he understood the police came

to the scene at someone's request (R. 168). He never testified that the police came to the scene nor was there any other evidence to show that the police ever did.

Respondent lost some retail customers as a result of the picketing (R. 37) and the Wynn-Warren Foodliner discontinued respondent's dairy products on August 31, 1955 (R. 39). This was done after a conversation with one Dye, manager of the Fleming Co., in Wichita, Kansas. Fleming Company was a supplier of the store in which Dye requested that respondent's milk be discontinued. Dye was in no way connected with petitioners. There was no picketing at the Wynn-Warren Store, no strike and no refusal, by the employees, to handle respondent's milk (R. 76).

On September 2, 1955, respondent procured, from the District Court of Butler County, Kansas, an ex parte restraining order, forbidding among other things, picketing of respondent's place of business (R. 13). A trial was had on September 8, 1955, at which time the case was taken under advisement and the restraining order continued in effect. The Court, on May 26, 1956, after having had the matter under advisement almost nine months, announced its decision and granted a permanent injunction to the same general effect (R. 136, Appendix B, *infra*, p. 23).

Timely appeal was taken to the Supreme Court of Kansas (R. 1) and on November 9, 1957, the Supreme Court of Kansas modified, and as modified affirmed, the judgment of the lower court (R. 171, Appendix C,

infra, p. 27). By the terms of the Kansas Supreme Court's order petitioners were permanently enjoined:

"A. From intimidating or threatening the plaintiff and his non-union employees by the use of photography or other unlawful means.

B. From intimidating, harassing or threatening patrons of the plaintiff's business by the use of photography or other unlawful means.

C. From any and all acts designed to boycott plaintiff's business.

D. From picketing plaintiff's place of business." (R. 188, Appendix C, *infra*, p. 27).

A timely motion for rehearing was filed (R. 190) and on December 18, 1957, the judgment of the Supreme Court denying the rehearing was entered (R. 238, Appendix D, *infra*, p. 56).

REASONS FOR GRANTING THE WRIT.

1. The Kansas Supreme Court held that jurisdiction of the National Labor Relations Board over a labor dispute is dependent upon a showing that the labor dispute has an appreciable effect upon interstate commerce. This is believed to be error. The limiting adjective "appreciable" is not found in the Labor Management Relations Act, 1947, as amended, 29 U.S.C. secs. 152, 160. (Appendix A, *infra*, p. 21). No such limiting word is found in this court's decisions. Indeed, the decisions of this court have made it abundantly clear that the juris-

diction vested in the National Labor Relations Board by the Labor Management Relations Act is exclusive, and that jurisdiction over labor disputes affecting interstate commerce has been preempted from the states. *Garner v. Teamsters Union*, 346 U.S. 485, 74 S. Ct. 161; *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 75 S. Ct. 480; *Amalgamated Meat Cutters, etc. v. Fairlawn Meats*, 353 U.S. 20, 77 S. Ct. 604; *Guss v. Utah Labor Relations Board*, 353 U.S. 1, 77 S. Ct. 598; *San Diego Building Trades Council v. Garmon*, 353 U.S. 27, 77 S. Ct. 607.

The decisions of this court hold squarely that the question of whether or not labor disputes affect interstate commerce is not to be determined by the immediate quantitative effect only. It is to be determined by the "total incidence" of such activities upon interstate commerce. *Polish National Alliance, etc. v. National Labor Relations Board*, 332 U.S. 643, 64 S. Ct. 1196. This court has made it clear that the operation of the Labor Management Relations Act, and the consequent preemption of jurisdiction from the state courts, is not to be determined by reference to the particular volume of commerce involved or affected. *National Labor Relations Board v. Fainblatt*, 306 U.S. 601, 59 S. Ct. 588. In one case, where a relatively small amount of interstate commerce was involved, this court held that the doctrine of *de minimus non curat lex* did not deprive the National Labor Relations Board of jurisdiction. *National Labor Relations Board v. Denver Building and Construction Trades Council*, 341 U.S. 675, 71 S. Ct. 675.

The Kansas Court recognized the rule that labor disputes affecting interstate commerce are within the exclusive jurisdiction of the National Labor Relations Board (R. 179, Appendix C, *infra*, p. 27). That court, however, rendered the rule meaningless by its application of the doctrine of *de minimus non curat lex*. This must follow because the *de minimus* doctrine, as it was applied in this case, is but one way of stating that an effect upon interstate commerce is present but is not of sufficient quantity to divest the state of jurisdiction. The very application of the doctrine postulates the fact of interstate commerce. And it is this undisputed fact of an effect upon interstate commerce which gives the National Board jurisdiction. Jurisdiction is thus preempted from the state. If the fact of interstate commerce had not been present, there would be no possible application of the rule of *de minimus*.

The mere fact that the National Board would obviously refuse to exercise its jurisdiction in no way operates to divest jurisdiction from the Board and reinvest the state court with jurisdiction. *Guss v. Utah Labor Relations Board*, 353 U.S. 1; 77 S. Ct. 598. This necessarily means that the jurisdiction of the National Board, and that of the state, are, absent a cession agreement, mutually exclusive. Thus it is that if the National Board chose to abandon its jurisdictional standards, its jurisdiction over the instant case could not be doubted, and could not be denied because of a small effect upon interstate commerce. *National Labor Relations Board v. Fainblatt, et al.*, 306 U.S. 601, 59 S. Ct. 688; *Polish National Alli-*

ance, etc. v. National Labor Relations Board, 322 U.S. 643, 64 S. Ct. 1196.

The rules, therefore, have been established that if interstate commerce is involved or affected exclusive jurisdiction is in the National Board. When the national jurisdiction is present the state jurisdiction falls (U.S. Const. art. VI, cl. 2). Even when the National Board declines to exercise its jurisdiction, jurisdiction is not given back to the state courts. The only labor disputes over which the state has jurisdiction are those in which interstate commerce is not burdened or affected.

The application of these principles has given rise to a "twilight zone", in which the National Board declines jurisdiction and the state is without power to exercise jurisdiction. This present rule, forbidding states to act in a labor dispute affecting interstate commerce, leaves some litigants without a forum to hear their grievances. That rule is definite. It has certainty to commend it. The Kansas Court replaces the certainty of the Congressional declaration with a rule of discretion to be applied by each of the forty eight state courts. Under this rule the "twilight zone" still exists. The limits of the "twilight zone", however, become vague and ill defined. They become dependent, not upon the existence of an effect upon interstate commerce, but upon a discretionary determination by any one of the myriad of state courts. Simply by finding that the effect upon interstate commerce is small, a state court may oust the national jurisdiction.

This Court has recognized that Congress has expressed its "judgment in favor of uniformity" in a single national labor policy. *Guss v. Utah Labor Relations Board*, 353 U.S. 1, 77 S. Ct. 598. This Court has also stated that the power of Congress over interstate commerce is plenary and that it extends to all such commerce whether it is great or small. *National Labor Relations Board v. Fainblatt*, 306 U.S. 601, 59 S. Ct. 558, and that Congress reached to the full extent of these plenary and complete powers in the Labor Management Relations Act. *Guss v. Utah Labor Relations Board*, 353 U.S. 1, 77 S. Ct. 598. Congress has the power to determine jurisdiction over the labor dispute here involved. Congress has vested that jurisdiction in the National Labor Relations Board. Because the plenary power of the Congress has been fully exercised it reaches all interstate commerce without regard to volume. The doctrine of *de minimus*, therefore, can have no application to the jurisdictional question here involved. Petitioners submit that the decision of the Kansas Court, by which it cuts off a portion of the federal jurisdiction, and thwarts the exercise of the plenary and complete powers of Congress over interstate commerce, is contrary to established law and should not be permitted to stand.

2. Even if it is assumed that the doctrine of *de minimus* may be applied in some cases, it cannot be applied in the instant case. It is undisputed that respondent purchased supplies in the amount of $100.00 each month from outside the state of Kansas (R. 119). His dairy

equipment, (R. 44) as well as his office machines (R. 117) and vehicles (R. 45), were manufactured outside of Kansas and purchased locally. Meadow Gold Company, an interstate enterprise (R. 131), bottled 500 cartons of milk daily for respondent (R. 112).

This Court has said that the "total incidence" of the situation is to be considered. Federal jurisdiction is present when the situation "is representative of many others throughout the country, the total incidence of which if left unchecked may well become far reaching in its harm to commerce." *Polish National Alliance, etc. v. National Labor Relations Board*, 332 U.S. 643, 64 S. Ct. 1196. It has also been held that the power of Congress under the commerce clause reaches even to intrastate activities which burden interstate commerce. *Wickard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82.

When these principles of law are applied to the instant facts, it is clear that this case is such that federal jurisdiction is contemplated by the National Act. The amount of commerce involved is substantial and the state court's decision, whereby it assumed jurisdiction, should not be permitted to stand.

The importance of a final decision by this Court is clear. Involved is the question of jurisdiction of the federal and state governments. The question has not been decided directly by this court. Until it is, no litigant may know to what law he is subject. He cannot determine the forum for his grievance with any degree of certainty. Petitioners submit that it is of great im-

portance that the question of overlapping jurisdiction here involved be finally decided.

3. The Kansas Court concluded that the picketing "was set in a background of intimidation and unlawful coercive pressures" (R. 188, Appendix C, *infra*, p. 27). On the basis of this finding the court issued a blanket injunction forbidding all picketing (R. 188, Appendix C, *infra*, p. 27). Petitioners submit that the Kansas Court was in error in concluding that intimidation and unlawful coercion were present, and further that the court was in error in forbidding all exercise of the freedom to picket. *Thornhill v. State of Alabama*, 310 U.S. 88, 60 S. Ct. 736; *Bakery and Pastry Drivers, etc. v. Wohl*, 315 U.S. 769, 62 S. Ct. 816; *Cafeteria Employees Union, etc. v. Angelos*, 320 U.S. 293, 64 S. Ct. 126.

In a case such as this, where it is urged that constitutional rights and liberties have been denied, this Court is justified in searching the record to determine the propriety of a state court's holding that violence, intimidation and unlawful acts were present. It is only by so doing that this Court can determine if the findings have a reasonable basis. *Local Union No. 6, etc. v. Graham*, 345 U.S. 192, 197, 73 S. Ct. 585, 588. Only by so doing can this Court determine if the right to freedom of speech has been denied under an erroneous conclusion that peaceful picketing has "the taint of force". *Milk Wagon Drivers Union, etc. v. Meadowmoor Dairies*, 312 U.S. 287, 293, 61 S. Ct. 552, 555. On the facts here presented the peaceful picketing was not so entangled with un-

lawful intimidation as to justify the blanket injunction forbidding all picketing and destroying petitioners' rights to freedom of speech (U. S. Const. Amend. I) and peaceable assembly (U. S. Const. Amend. XIV, sec. 1). The blanket injunction forbidding all picketing is as repugnant to the Federal Constitution as was the Alabama statute in *Thornhill v. State of Alabama*, 310 U.S. 88, 60 S. Ct. 536.

The findings upon which the Kansas Supreme Court based its denial of the constitutional right to picket are summarized in the opinion (R. 184, 188; Appendix C, *infra*, p. 27). It is said that profanity was used (R. 184, Appendix C, *infra*, p. 27). Yet the only support for this finding was the testimony of respondent to the effect that he had heard the single word "damn", didn't see who uttered it, didn't recognize the voice that uttered it, and he just "admits hearing the word." (R. 63) The evidence (R. 61) shows that the picketing was performed by only one individual at a time. Since respondent stated (R. 62) that the utterance came from someone sitting down, it must necessarily have been from someone other than the picket patrolling at the time. Therefore, no direct connection was shown between the picketing and the use of the so-called abusive language.

It is said that the police were "called by a neighbor lady" (R. 168, R. 184, Appendix C, *infra*, p. 27). The only evidence of this is respondent's own testimony that he understood "the police did come up there at someone's request" (R. 168). The Kansas Supreme Court, from this hearsay testimony, apparently concluded that

the police were called and then apparently inferred that if the police were called they must have come to quell some disturbance or illegal act. There is absolutely no evidence of any such disturbance or illegal act. The Kansas Court thus imputes the "taint of force" to the pickets simply because the respondent testified that he understood the police were called by a neighbor lady. And the court does so in the total absence of any showing of a reason for calling the police.

If hearsay evidence that the police were telephoned by a neighbor is sufficient to support a finding of illegality in picketing, and in turn justify a court in enjoining all picketing, then, indeed, a convenient and lethal weapon has been devised to destroy the constitutionally guaranteed freedom to picket.

The Supreme Court of Kansas, from the fact that pictures were taken, infers an illegal purpose (R. 184, Appendix C, *infra*, p. 27). Yet there was absolutely no showing that any of these pictures were taken for illegal purposes, and the pictures were voluntarily introduced into evidence by petitioners (R. 128).

There was no evidence from which a secondary boycott, unlawful under the National Act, might be inferred. There was evidence from which a secondary boycott, unlawful under Kansas law, might be inferred. However, there was no showing of any connection between this boycott and the peaceful picketing.

On the basis of these facts the Kansas Supreme Court held that the picketing was laid in a background of vio-

lence and enjoined picketing, including all peaceful picketing.

Because the record does not support any showing of violence or any imminent threat of harm, and certainly no showing of threatened future coercion, the doctrine of *Milk Wagon Drivers v. Meadowmoor Dairies*, 312 U.S. 287, 61 S. Ct. 552, was erroneously applied by the Kansas Supreme Court. When applied to the instant case, the doctrine of the *Milk Wagon Drivers* case results in a deprivation of the constitutional right to picket. This is clearly contrary to the decision of this court in *Youngdahl v. Rainfair, Inc.*, .. U.S. .., 78 S. Ct. 206, and requires a reversal of the decision of the Kansas Supreme Court.

Petitioners submit that a thorough analysis of the record reveals no act of coercion or illegality on the part of the pickets. If, however, the taking of photographs is to be considered illegal, and if the secondary boycott is to be imputed to the pickets, and if the use of the single word "damn" is to be indicted as criminal, then the proper remedy is injunction against these acts and against these acts only. Certainly isolated acts such as these cannot form the foundation for the forfeiture of all rights of freedom of speech and freedom of assembly. *Cafeteria Employees Union, etc. v. Angelos*, 320 U.S. 293, 64 S. Ct. 126.

In the recent case of *Youngdahl, et al v. Rainfair, Inc.*, .. U.S. .., 78 S. Ct. 206, this Court refused to find, on the facts of that case, that " . . . violence was established which would inevitably reappear in the event

that picketing was later resumed." Yet it is apparent from the holding in the *Youngdahl* case that only such a finding will support a permanent injunction under the doctrine of *Milk Wagon Drivers Union, et al., v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 61 S. Ct. 552. In the *Youngdahl* case the strikers scattered tacks, threatened company officials, followed the plant manager and harrassed him at home with telephone calls, cut automobile tires, called other workers names, sang boisterous songs and made indecent gestures toward the workers. The contrast between the facts presented in the *Youngdahl* case and those presented by this record is so great that no comment is required. This Court, however, held that the facts of the *Youngdahl* case were not sufficient to support a permanent injunction against all picketing and that the doctrine of the *Milk Wagon Drivers Union* case did not permit such a blanket injunction. The holding in the *Youngdahl* case is in harmony with this Court's earlier treatment of the consitutional right to picket in *Thornhill v. State of Alabama*, 310 U.S. 88, 60 S. Ct. 736; *Bakery and Pastry Drivers, etc. v. Wohl*, 315 U.S. 769, 62 S. Ct. 816; *Cafeteria Employees Union etc. v. Angelos*, 320 U.S. 293, 64 S. Ct. 126.

Petitioners submit that the decision in this case is contrary to the principles of the recent *Youngdahl* case, and that petitioners cannot be deprived of their constitutional rights to freedom of speech and freedom of assembly on the facts of the instant case.

CONCLUSION.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

PAYNE H. RATNER,
Counsel for Petitioners.

APPENDIX A.

First Amendment to the Constitution of the United States:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fourteenth Amendment to the Constitution of the United States:

Section One.

> "*Citizenship; privileges or immunities; due process clause.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article VI, clause 2 of the Constitution of the United States:

> "*Supreme law of land.* This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

29 U.S.C. Section 152:

(6)

"The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

"The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

29 U.S.C. Section 160:

(a)

"The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith."

28 U.S.C. Section 1257:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * * * *

(3)

"By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929."

APPENDIX B.

(Omitting captions and signatures)

Now on this 8th day of September, 1955, the same being a regular judicial day of the June, 1955, term of this Court, this matter comes on for hearing pursuant to an order of the Court made and entered on the 2nd day of September, 1955, whereby the defendants were ordered to show cause if they, or any of them, had any reason why a permanent injunction should not be made and entered in this cause against the defendants.

Thereupon, an answer having been prepared and filed by the defendants, on the 8th day of September, 1955, and a supplemental petition having been prepared and filed by the plaintiff on the 8th day of September, 1955, this matter proceeded to trial.

Thereupon, the plaintiff introduced testimony on his behalf and the testimony of other witnesses was introduced on behalf of plaintiff, and plaintiff rested. Thereupon, defendants demurred to the evidence of the plaintiff. Argument was then made in support of said demurrer by counsel for defendants and argument was then made against said demurrer by counsel for plaintiff. The Court, after hearing the argument and after being advised in the premises, found that the demurrer should be sustained as to the attorneys of record of the defendants and overruled as to all other defendants.

IT IS THEREFORE BY THE COURT CONSIDERED, ORDERED, ADJUDGED AND DECREED that the demurrer be and the same is hereby sustained as to the at-

torneys of the defendants and overruled as to all other defendants.

THEREUPON, testimony was introduced on behalf of the defendants and the defendants rested.

THEREUPON, the Court announced that it would take the case before it under advisement and counsel for plaintiff and counsel for defendant requested the Court for ten days' leave within which to file briefs.

Now on this 22nd day of May, 1956, the same being a regular judicial day of the March, 1956, term of this Court, this matter comes on for decision by the Court. The Court, having received the Briefs of the parties involved, and after studying the Briefs and the transcript in this case, the Court is of the opinion that the plaintiff, Richard Newell, d/b/a the El Dorado Dairy, was not engaged in interstate commerce, nor did the business conducted by him appreciably affect interstate commerce, and that the National Labor Relations Board does not have jurisdiction herein, but that the State Court does have jurisdiction; that the strike was illegally called; that the defendant did not comply with the applicable Kansas statutes; that the picketing was not peaceful due to the fact that there was enough disturbance by the pickets, making it necessary for the police to be called on at least one occasion; that the taking of pictures or pretended pictures was an intimidation to the public and the customers of the plaintiff, and the Court further finds generally for the plaintiff on all issues of fact and law herein, and that the injunction prayed for herein should be made permanent.

IT IS THEREFORE BY THE COURT CONSIDERED, ORDERED, ADJUDGED AND DECREED that the defendant, Chauffeurs, Teamsters & Helpers Local Union 795, S. E. Smith, and the agents, servants and employees of said defendant and each and every and all other persons acting at the direction and in consort with the said defendant or any of them, be and they are permanently enjoined and restrained:

A. From molesting, bothering, threatening, intimidating or interfering with the plaintiff, his place of business, property, employees or any of them.

B. From intimidating, harrassing, threatening or interfering with patrons of the plaintiff either by threats or any other unlawful means, or seeking to induce or inducing any customer or customers, patron or patrons of plaintiff away from place of business or directing, inducing or intimidating away the patronage of business from him.

C. From inducing, intimidating, or encouraging employees of employers, other than plaintiff, by orders, boycott or blacklist or any other like or similar acts to engage in a concerted refusal in the course of their employment to transport the goods, wares and merchandise of said employers, in order to force such other employers to cease doing business with plaintiff or with customers and patrons of plaintiff.

D. From stationing or placing at any place in front of or about plaintiff's place of business or in the immediate vicinity thereof any picket, picket line, picket group or picket patrol.

E. From any attempt to force or intimidate plaintiff to bargain with defendants on behalf of non-employees of said plaintiff.

To which ruling of said Court said defendants then and there excepted and except.

THEREUPON, within three days said defendants filed their Motion for a new trial, which Motion being carefully examined by the Court is by the Court on June 14th, 1956, overruled. To which said ruling defendants then and there excepted and except.

APPENDIX C.

No. 40,486

RICHARD NEWELL, d/b/a EL DORADO DAIRY, *Appellee.* v. CHAUFFEURS, TEAMSTERS & HELPERS LOCAL UNION 795; S. E. SMITH and the agents, servants, employees and attorneys of any of said defendants, *Appellants.*

SYLLABUS BY THE COURT

1. LABOR RELATIONS—*Unfair Labor Practice—Jurisdiction of State Court Challenged—Finding Business Not Affected by Interstate Commerce—Supported by Evidence.* Where application for relief is made in a state court concerning an unfair labor practice and the jurisdiction of the state is challenged, it is *held* that the findings of the trial court, upon the uncontroverted evidence in the case as more particularly set forth in the opinion, that the business out of which the labor dispute arose does not appreciably affect interstate commerce and that the National Labor Relations Board does not have jurisdiction, are supported by the evidence upon the ground that under all the facts and circumstances presented by the record the purchase of items from sources outside the state (to the extent of $100.00 per month) are negligible under the maxim *de minimis non curat lex*, and such findings are not erroneous as a matter of law.

2. SAME—*Unfair Labor Practice Affecting Interstate Commerce—Jurisdiction in N. L. R. B.—Application for Relief in State Court—Whether Interstate Commerce Affected Question for State Court.* Congress has vested exclusive jurisdiction in the National Labor Relations Board and empowered it to prevent any person from engaging in any unfair labor practice affecting (interstate) commerce. Whether an unfair labor practice, which is either protected or prohibited by the Labor Management Relations Act, 1947, and by the state statutes, affects (interstate) commerce is a question of fact upon which jurisdiction rests. An application for relief in a state court concerning an unfair labor practice em-

powers the state court to determine this question of fact from the *evidence* where state jurisdiction is challenged.

3. SAME—*Test Determining Jurisdiction of N.L.R.B.* The test to determine whether the National Labor Relations Board has jurisdiction of an unfair labor practice is not the volume of the interstate commerce which may be affected, but the evidence of such a relationship between the employer and his employees to the commerce that an unfair labor practice would lead or tend to lead to a labor dispute burdening or obstructing the free flow of commerce. The power granted by Congress to the National Labor Relations Board must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.

4. SAME—*When Interstate Commerce Not Burdened Considered.* A labor dispute between an employer and employees does not burden or obstruct the free flow of interstate commerce merely because, in the purchase of capital assets such as dairy processing equipment, trucks, and an adding machine from local sources long prior to the labor dispute, such assets were originally manufactured in another state, where in the operation of a dairy business all dairy products were purchased locally, processed locally and sold locally.

5. SAME—*Picketing As a Right of Free Speech.* Picketing as a means of peaceful and truthful publicity has been justified under the constitutional guarantee of the right of free speech, but when the picketing goes beyond this purpose to induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated, it is no longer entitled to protection as a constitutional guarantee of free speech.

6. SAME—*Picketing for Purpose of Intimidation and Coercion.* Though Union employees may have a legal right

to strike and picket the employer's place of business in a peaceable manner, where the lawful purposes of picketing are entangled with acts of intimidation and threatened use of force, the picketing in its entirety becomes tainted with coercion, which is an unlawful purpose of picketing, and may be enjoined.

7. SAME—*Picketing—Photographing Patrons a Coercive Measure.* Where pickets, under circumstances set forth in Syllabus No. 6, and a Union official resort to the photographing, or pretense of photographing, patrons and nonunion employees of an employer's business who ignore the picket line, such conduct represents acts of intimidation and threatened use of force against such individuals and the employer. They are unlawful coercive pressures designed for the ultimate purpose of strangulating the employer's business unless he succumbs to the Union's demands.

8. SAME—*Unfair Labor Practice—Boycott.* Where a labor dispute exists between an employer and a Labor Union, acts and conduct of the Labor Union designed to boycott the employer's business are unlawful under G. S. 1955 Supp., 44-809a(1), and may be permanently enjoined.

9. SAME—*Violation of State Statute—Injunctive Relief.* G. S. 1955 Supp., 44-814, gives rise to a statutory cause of action for injunctive relief against any person who violates the provisions of Chapter 44, Article 8 of the Kansas statutes, and may be invoked by any party aggrieved.

10. SAME—*Picketing—Intimidation and Threats—Injunction No Infringement of Constitutional Guarantees.* Where a labor controversy is attended by peaceful picketing and by unlawful intimidation and threats which are coercive, and the unlawful coercive pressures have been such that continuation of the picketing, though peaceable, will operate to revive the coercive pressures by exciting fear that such coercive pressures will be resumed, a permanent injunction forbidding the

picketing as well as the coercive conduct does not infringe constitutional guarantees.

Appeal from Butler district court, division No. 2; W. N. Calkins, judge. Opinion filed November 9, 1957. Affirmed as modified.

Russell Cranmer, of Wichita, argued the cause, and *Payne H. Ratner, Louise Mattox, Payne H. Ratner, Jr., Dale B. Stinson, Jr., Cliff W. Ratner, William L. Fry, A. Wayne Murphy, Bernard V. Borst, D. Clifford Allison*, and *Gerald D. Lasswell*, all of Wichita, were with him on the briefs for appellants.

M. F. Litras, of ElDorado, argued the cause, and *R. C. Woodward* and *H. Pauline Woodward*, both of ElDorado, were with him on the briefs for appellee.

The opinion of the court was delivered by

Schroeder, J.: This is an appeal from an order granting an employer a permanent injunction against a Labor Union for activities alleged to consist of unlawful picketing and boycotting the employer's dairy business in ElDorado, Kansas. The Union appeals to this court contending: (1) That the district court did not have jurisdiction of the subject matter of the action since it involved a labor dispute within the exclusive jurisdiction of the National Labor Relations Board, and (2) that even though the National Labor Relations Board would not take jurisdiction, the conduct of the Union was protected under the Federal law.

The appellee, Richard Newell, is the owner and operator of the ElDorado Dairy. He filed this action as plaintiff in the district court of Butler County, Kansas, against the Chauffeurs, Teamsters & Helpers Local Union 795; S. E. Smith and the agents, servants, employees and attorneys of any of said defendants, appellants herein.

The district court found generally for the appellee in granting the injunction, therefore, the facts disclosed by the evidence will be set forth most favorably to the appellee where the evidence conflicts. If it is assumed that there is state jurisdiction of the labor dispute in question, the judgment insofar as it is supported by the evidence, from which the trial court could find as it did and issue the permanent injunction, must stand.

The appellee employed Cleo A. Hodgens as a wholesale route driver, Orville A. Church as a retail route driver, and Bobby Dee Grant as a relief driver and also as helper on two dairy routes in ElDorado, Kansas. On July 14, 1955, these three employees authorized the appellant Union to represent them in negotiations with respect to wages, hours and conditions of employment with the appellee. Appellant, S. E. Smith, the president and business agent of the appellant Union, so notified Richard Newell on July 15, 1955, by registered letter. Smith further requested Newell to advise him whether or not Newell would recognize the Local Union 795 as the bargaining agent of the employees in the afore-stated job classifications and further requested a meeting with Newell for the purpose of negotiating a working condition contract.

Newell received the letter from Smith on Saturday, July 16, 1955. Thereafter, Newell transferred the relief driver and helper to inside work. He took the wholesale driver for a ride but did not discuss the letter he had received from Smith. He then fired the retail driver, Church, on July 19, 1955. On the following day

Smith received Newell's answering letter which informed Smith that he would be glad to discuss anything concerning the drivers and helpers. Smith then went to ElDorado and met with Newell. At the meeting Smith requested that the retail driver be put back to work and that Newell recognize the Union and commence negotiating a working condition contract. Newell refused to put Church back to work giving as his reason the inefficiency and carelessness with which Church had been performing his work. The discussion centered only around the employment of Church, Smith refusing to negotiate in any manner until Church was reinstated as an employee. Newell's attorney was on vacation at the time of the conference and Newell refused to make further commitments until such time as he had an opportunity to consult with his attorney. On this point Smith testified:

" . . . I asked him again if he wouldn't consider the reinstatement of Church and negotiate a contract. He told me without seeing his attorney that was his final answer. I told him 'I am satisfied if that is your final answer there will be a strike at your place Monday morning, July 25th'. I contacted the men and they requested I come and meet them at Orville Church's house."

S. E. Smith and Mel Chance then met with Hodgens, Grant and Church at the latter's house in ElDorado, Kansas, on Saturday, July 23.

Picketing of the ElDorado Dairy started on Monday, July 25. They picketed every day except Sunday from 8:00 a.m., to 5:30 p.m. The employees, Hodgens, Church and Grant, picketed one at a time and walked back and

forth in front of the appellee's dairy in the street about two feet from the curb. Each walked for thirty minutes and was then off for one hour, but usually remained in the vicinity, either across the street or next to the dairy property on either side. The person picketing carried a banner on which the legend read as follows:

"This establishment on strike, Teamsters' Union Local 795—Wichita."

The persons picketing handed out literature. They gave it to retail customers as they left the ElDorado Dairy building and some of the literature was left at grocery stores in which appellee's dairy products were sold. The leaflet handed out read as follows:

"ELDORADO DAIRY ON STRIKE!

"All consumers of milk and other products sold by the ElDorado Dairy Co. are advised that a strike of driver and helper employees continues at that plant.

"Non-union drivers are delivering milk to retail customers and the owner himself is delivering to the stores and other wholesale stops.

"These striking employees are fighting for decent wages and conditions—believing that they too are entitled to more than $25.00 to $55.00 per week for their efforts.

"Won't you please help these men in their efforts to better themselves by *Not* purchasing milk and other products sold by the Eldorado Dairy Co.

"STRIKING EMPLOYEES OF
ELDORADO DAIRY CO."

S. E. Smith himself took pictures and instructed Mr. Nitcher, an agent of the appellant Union in charge of the picketing, to see that pictures were taken. Among

the pictures taken by Smith was defendant's Exhibit D showing two of the men employed during the strike to drive the ElDorado Dairy Company trucks; defendant's Exhibit F, a photo of a customer entering the front door of the ElDorado Dairy; defendant's Exhibit G shows the same customer leaving the dairy with a sack full of purchases together with the picket in front of the dairy; defendant's Exhibit I shows an employee of the ElDorado Dairy who is either loading or unloading some cases from the truck at the side entrance to the dairy; and defendant's Exhibit K shows the front of the ElDorado Dairy with the picket, Bobby Grant, and a customer who was getting out of his pick-up truck in front of the dairy.

Church testified that S. E. Smith instructed him to take his camera to the ElDorado Dairy during the course of the picketing. Church stated that his hobby was photography and that he took pictures of persons entering and leaving the ElDorado Dairy, although part of the time there was no film in the camera. Each of the other pickets, Hodgens and Grant, either took pictures of patrons entering the ElDorado Dairy and leaving or pretended that they were taking pictures when there was no film in the camera. Numerous complaints were made by customers of the ElDorado Dairy to Mr. Newell or other employees of the dairy relative to having their pictures taken by the pickets. Profanity was heard in connection with the picketing and the evidence discloses that the police were called on one occasion concerning the conduct of the pickets by a lady living near the ElDorado Dairy.

The picketing seriously affected the amount of business carried on by the ElDorado Dairy. Some of the retail customers on the route quit taking appellee's dairy products. Others refused to purchase products sold at retail at the ElDorado Dairy building itself, and three wholesale outlets which sold at retail stopped taking ElDorado Dairy products. These were the Farm and City Market, Wynn-Warren Foodliner and the Kroger Market.

The manager of the Farm and City Market informed the appellee that he did not want the appellee's milk in his store because the appellee was having labor trouble. Mel Chance, a business agent of the appellant Union, informed Neil Cottler, the manager of the Associated Grocers Corporation in Wichita, Kansas, that there was a labor controversy between the appellant Union and the appellee. The Associated Grocers Corporation hires members of the appellant Union as warehousemen and truck drivers pursuant to a working condition contract between the Union and the Associated Grocers Corporation. The Associated Grocers Corporation supplies the Joe Brown Market, Carter's Market, Graham's Market and the Lockwood Market in ElDorado with groceries. All of these stores handle milk of the ElDorado Dairy. There was neither a labor dispute at any of these markets, nor did picketing take place at them. There is a provision in the contract between the Union and the Associated Grocers Corporation that their employees cannot be compelled to cross a picket line where a labor dispute exists.

Eldon Dye, manager of the Fleming Company, Wichita, Kansas, requested Burl Wynn, a partner of the Wynn-Warren Foodliner, a grocery store in El-Dorado, to take the appellee's milk out of the Wynn-Warren Foodliner. On Wednesday, August 31, 1955, pursuant to this request, Burl Wynn discontinued selling the appellee's dairy products at the Wynn-Warren Foodliner. On September 2, 1955, Mel Chance went into the Wynn-Warren Foodliner to ascertain whether Eldorado Dairy products were being handled there. Chance disputed the word of Burl Wynn after examining the milk counter. It was not until Wynn pointed out that the word "Eldorado" on the cap of milk bottles represented the place where the Meadow Gold milk, which he had in the counter, was bottled that Chance was satisfied Eldorado Dairy products had been removed from the store. The Fleming Company, distributor of IGA stock, was the Wynn-Warren Foodliner's chief source of grocery supplies. Mr. Dye had informed Wynn that the appellant Union had made the request that the milk be removed. Mr. Wynn testified as follows:

". . . Mr. Chance came to see if the milk had been removed. I had never met Mr. Chance, and I don't believe I have since. After some controversy, I was of the opinion we had a right to put milk in our box, but naturally, I felt, if they were going to put the finger just because I bought groceries, it was easier to stop my source of supply, I asked Mr. Chance what they expected to do.

"Q. What did Mr. Chance propose to you?

"A. I ask him how he proposed to shut off our supply of groceries, was he going to put pickets around

our place or the Fleming place. He said, 'No,' all he would have to do would be to notify the Fleming drivers they should not deliver groceries and that would be all there was to it. I want it understood I have no hard feelings, I was subpoenaed to tell my story and I am here now because of that."

On September 2, 1955, the appellee procured an *ex parte* restraining order enjoining the appellant from, among other things, picketing the appellee's place of business. The trial court further ordered the appellants to appear before the court on September 8, 1955, and show cause why they should not be permanently enjoined.

On September 8, 1955, the appellants appeared and trial was had on the merits of the case. The court then continued the restrainig order in effect and took the case under advisement. The court announced its decision on May 26, 1956, granting a permanent injunction from which the appellants have appealed.

The court sustained a demurrer as to the attorneys for the appellant who were made parties defendant in the lower court and thus removed them from the action. The journal entry of the trial court insofar as pertinent reads as follows:

" . . . the Court is of the opinion that the plaintiff, Richard Newell, d/b/a the El Dorado Dairy, was not engaged in interstate commerce, nor did the business conducted by him appreciably affect interstate commerce, and that the National Labor Relations Board does not have jurisdiction herein, but that the State Court does have jurisdiction; that the strike was illegally called; that the defendant did not comply with the applicable Kansas statutes; that the picketing was not peaceful

due to the fact that there was enough disturbance by the pickets, making it necessary for the police to be called on at least one occasion; that the taking of pictures or pretended pictures was an intimidation to the public and the customers of the plaintiff, and the Court further finds generally for the plaintiff on all issues of fact and law herein, and that the injunction prayed for herein should be made permanent.

"IT IS THEREFORE BY THE COURT CONSIDERED, ORDERED, ADJUDGED AND DECREED That the defendant, Chauffeurs, Teamsters & Helpers Local Union 795, S. E. Smith, and the agents, servants and employees of said defendant and each and every and all other persons acting at the direction and in consort with the said defendant or any of them, be and they are permanently enjoined and restrained:

"A. From molesting, bothering, threatening, intimidating or interfering with the plaintiff, his place of business, property, employees or any of them.

"B. From intimidating, harrassing, threatening or interfering with patrons of the plaintiff either by threats or any other unlawful means, or seeking to induce or inducing any customer or customers, patron or patrons of plaintiff away from place of business or directing, inducing or intimidating away the patronage of business from him.

"C. From inducing, intimidating, or encouraging employees of employers, other that [than] plaintiff, by orders, boycott or blacklist or any other like or similar acts to engage in a concerted refusal in the course of their employment to transport the goods, wares and merchandise of said employers, in order to force such other employers to cease doing business with plaintiff or with customers and patrons of plaintiff.

"D. From stationing or placing at any place in front of or about plaintiff's place of business or in the immediate vicinity thereof any picket, picket line, picket group or picket patrol.

"E. From any attempt to force or intimidate plaintiff to bargain with defendants on behalf of nonemployees of said plaintiff."

The undisputed *evidence* presented by the record discloses that the appellee's annual gross sales were approximately $100,000.00. The total annual gross purchases of the appellee were approximately $72,000.00. The appellee purchased supplies from outside the State of Kansas in the sum of $100.00 per month which were used in the appellee's dairy. The appellee's dairy equipment was manufactured outside the State of Kansas but was purchased locally. The appellee used two trucks, a Ford and a GMC, both of which were purchased locally but manufactured outside the State of Kansas. The appellee purchased all of his dairy products locally, processed them locally and sold them locally.

Recent cases have made it clear, where unfair labor practices are either protected or prohibited by the Labor Management Relations Act, 1947, that Congress has preempted the field in labor relations matters affecting (interstate) commerce and has vested exclusive jurisdiction in the National Labor Relations Board to determine such labor disputes. (*Guss v. Utah Labor Relations Board*, 353 U.S. 1, 77 S. Ct. 598, 1 L. Ed. 2d 601; *Meat Cutters Local v. Fairlawn Meats*, 353 U.S. 20, 77 S. Ct. 604, 1 L. Ed. 2d 613; *Fricsen v. General Team & Truck Drivers Local Union, No. 54*, 181 Kan. ..., ... P. 2d ...; *Asphalt Paving v. Local Union*, 181 Kan. ....., ... P. 2d ...; and *Stieben v. Local Union No. 685*, 181 Kan. ....., ... P. 2d. .....).

Does the appellee's business affect interstate commerce? The Labor Management Relations Act, 1947, (29 U.S. C.A. § 152) defines the terms "commerce" and "affecting commerce" as follows:

"(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory of the District of Columbia or any foreign country.

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

It is apparent from the foregoing sections of the Act that Congress has set no restrictions upon the jurisdiction of the Board to be determined or fixed exclusively by reference to the volume of interstate commerce involved.

In *Labor Board v. Fainblatt*, 306 U.S. 601, 59 S. Ct. 668, 83 L. Ed. 1014, the Supreme Court said:

"The Act on its face thus evidences the intention of Congress to exercise whatever power is constitutionally given to it to regulate commerce by the adoption of measures for the prevention or control of certain specified acts—unfair labor practices—which provoke or tend to provoke strikes or labor disturbances affecting interstate commerce. Given the other needful conditions, commerce may be affected in the same manner and to the same extent in proportion to its volume, whether it

be great or small. Examining the Act in the light of its purpose and of the circumstances in which it must be applied we can perceive no basis for inferring any intention of Congress to make the operation of the Act depend on any particular volume of commerce affected more than that to which courts would apply the maxim *de minimis.*" (p. 607.)

The question whether or not a particular business affects interstate commerce must always be determined upon the facts and circumstances in each case. (*Edison Co. v. Labor Board*, 305 U.S. 197, 59 S. Ct. 206, 83 L. Ed. 126; *National Labor Relations Bd. v. Santa Cruz Fruit P. Co.*, 91 F. 2d 790 [affirmed 303 U.S. 453, 58 S. Ct. 656, 82 L. Ed. 954]; *Labor Board v. Denver Bldg. Council*, 341 U.S. 675, 71 S. Ct. 943, 95 L. Ed. 1284; and *National Labor Rel. Bd. v. Tri-State Casualty Ins. Co.*, 188 F. 2d 50.) The test of the Board's jurisdiction is not the volume of interstate commerce which may be affected, but the existence of such a relationship between the employer and his employees to the commerce that an unfair labor practice would lead or tend to lead to a labor dispute burdening or obstructing the free flow of commerce. (*Labor Board v. Fainblatt*, supra.) If the flow of commerce is obstructed by a labor dispute it makes no difference in principle whether the interference is with the inward or outward movement of the goods. Commerce is affected in either case. (*Collins Baking Co. v. National Labor Relations Board*, 193 F. 2d 483.)

A study of recent decisions in the Federal courts (*National Labor Relations Bd. v. United Brotherhood*, 184 F. 2d 60 [certiorari denied 341 U.S. 947, 71 S. Ct.

1011, 95 L. Ed. 1371; rehearing denied 342 U.S. 843, 72, S. Ct. 20, 96 L. Ed. 637]; *National Labor Relations Board v. Townsend,* 185 F. 2d 378 [certiorari denied 341 U.S. 909, 71 S. Ct. 621, 95 L. Ed. 1346]; *National Labor Relations Board v. Bill Daniels, Inc.,* 202 F. 2d 579 [reversed per curiam 346 U. S. 918, 74 S. Ct. 305, 98 L. Ed. 413]; *National Labor Rel. Bd. v. Tri-State Casualty Ins. Co.,* supra; *Labor Board v. Denver Bldg. Council,* supra; *Carpenters Union v. Labor Board,* 341 U.S. 707, 71 S. Ct. 966, 95 L. Ed. 1309; and *Howell Chev. Co. v. Labor Board,* 346 U.S. 482, 74 S. Ct. 214, 98 L. Ed. 215) gives perspective to an application of the foregoing rules. In the instant case we are confronted with facts and circumstances which focus our attention upon the maxim *de minimis non curat lex,* meaning—the law does not notice (or care for) trifling matters. (See, *Labor Board v. Denver Bldg. Council,* supra; and *National Labor Relations Board v. Townsend,* supra.)

Language by the Supreme Court in *Labor Board v. Jones & Laughlin,* 301 U. S. 1, 57 S. Ct. 615, 81 L. Ed. 893, decided under the Wagner Act which defined "affecting commerce" in the same identical language as the Labor Management Relations Act, 1947, is illuminating:

"This definition is one of exclusion as well as inclusion. The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds. . . ." (p. 31.)

". . . Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. . . ." (p. 37.)

This court has recently held that whether an unfair labor practice, which is either protected or prohibited by the Labor Management Relations Act, 1947, and by the state statutes, affects (interstate) commerce is a question of fact upon which jurisdiction rests. Where state jurisdiction is challenged, an application for relief in a state court concerning an unfair labor practice empowers the state court to determine this question of fact from the evidence. (*Binder v. Local Union No. 685*, 181 Kan. ____, ____ P. 2d ____; and *Asphalt Paving v. Local Union*, supra.)

In the instant case the trial court found from the evidence that Richard Newell, d/b/a the ElDorado Dairy, "was not engaged in interstate commerce, nor did the business conducted by him appreciably affect interstate commerce." Upon all the facts and circumstances presented by the evidence in this case we see no justification for disturbing the trial court's finding. All dairy products were purchased locally, processed locally and sold locally. It could not be seriously argued that a labor dispute between the employer and employees would burden or obstruct the free flow of interstate commerce in this case merely because, in the purchase of capital assets from local sources long prior to the labor dispute, such

assets were originally manufactured in another state. Should this contention of the appellants be upheld every businessman who wears cloths manufactured outside the state, who drives an automobile manufactured outside the state, or who uses tools in his business that are manufactured outside of the state would be engaged in a business affecting interstate commerce within the meaning of the Labor Management Relations Act, 1947. If this were the law every person doing business in Kansas would be so engaged.

Under all of the facts and circumstances presented by the record in this case we cannot say that the trial court erred as a matter of law in finding that the purchase of items to the extent of $100.00 per month from sources beyond the borders of Kansas in the operation of the El-Dorado Dairy were negligible under the maxim *de minimis*.

Appellants contend that even though the National Labor Relations Board would not take jurisdiction, the conduct of the Union was protected under the Federal law. Where a labor dispute does not affect interstate commerce within the meaning of the Federal Act, it is immaterial whether the unfair labor practices are protected or prohibited by the Labor Management Relations Act, 1947. Under such circumstances the labor dispute is within state domain.

The National Labor Relations Board in the exercise of its discretion has adopted arbitrary jurisdictional standards based upon the gross annual business of an employer. Those falling below the minimum jurisdictional standard set by the Board are informed upon application

for relief that "the policies of the Act would not be effectuated by its assertion of jurisdiction in that case." (*Labor Board v. Denver Bldg. Council*, supra, p. 684; See, also: *Friesen v. General Team & Truck Drivers Local Union No. 54*, supra; *Guss v. Utah Labor Relations Board*, supra; and *Meat Cutters Local v. Fairlawn*, supra.) This declination of jurisdiction may have been for budgetary or other reasons. The effect has been to create a vast no-man's land. The United States Senate Committee on Labor and Public Welfare recognized this fact in 1954 and proposed an amendment which would have empowered state courts and agencies to act upon the National Board's declination of jurisdiction: The Committee recognized the situation in these cases to be that where the Board will not assert jurisdiction over unfair labor practices affecting interstate commerce, the states are forbidden to do so, and the injured parties are deprived of any forum in which to seek relief. (S. Rep. No. 1211, 83d Cong., 2d Sess. 18.) There is thus a hiatus—a no-man's land—in which the Federal Board declines to exercise its jurisdiction and the state agencies and courts have no jurisdiction. (*Guss v. Utah Labor Relations Board*, supra.) Congress, however, failed to act upon the amendment. Precisely what inference may be drawn from such Congressional inaction is wholly speculative.

"Appellants' position, if adopted as the law of this state, would have this court abdicate from all controversies involving unfair labor practices which are either prohibited or protected under the Labor Management Relations Act, 1947, since all business would affect interstate commerce.

For this "Utopian" the appellant Union strives. Such law would leave small businesses at the complete mercy of powerful Labor Unions. They could organize and force negotiation in utter disregard of labor practices declared unlawful by both state and Federal laws. By unleashing powerful labor organizations against small businesses denied remedy, the obligation of contract which has ordered our economy for centuries could indiscriminately fall by impairment through the uncontrolled application of unfair labor practices. In this process many small businesses could be destroyed.

It would shock the conscience of this court to believe for one moment that Congress so intended the Labor Management Relations Act, 1947, to apply.

We have observed with particularity the fact that appellants have made no application to a state court for affirmative relief from labor practices on the part of the appellee. Assuming that appellants have a just grievance against Richard Newell, d/b/a the ElDorado Dairy, for interfering with the protected rights of his employees to organize and join a Labor Union of their own choice, and that the employees have the lawful right to strike and peaceably picket for a just grievance (questions we leave open for reasons hereafter stated), these facts in themselves would not authorize resort to unlawful labor practices by a Union in retaliation.

The appellee in the lower court has requested injunctive relief. If the foregoing assumptions were true, the question immediately arises whether one who seeks equity must do equity. This is answered by G. S. 1955 Supp.

44-814, which gives rise to a statutory cause of action. Any person violating the provisions of Chapter 44, Article 8 of the Kansas statutes on Employer and Employee Relations may be enjoined by *any aggrieved party* from violating the provisions thereof by action in the district court of the proper county. Appellee is therefore authorized to maintain this action against the appellants. (See, *Binder v. Local Union No. 685*, supra.)

Appellants argue that G. S. 1949, 60-1107, places certain restrictions upon district courts in granting injunctions involving labor disputes. This statute provides that no restraining order or injunction shall be granted by any court of the state of Kansas in any case between employers and employees. It is not applicable where third persons are involved. (*Bull v. International Alliance*, 119 Kan. 713, 241 Pac. 459.) The appellants in the instant case do not fall within any of the classes stated in the statute, and are thus beyond the scope of its application. Whether G. S. 1955 Supp., 44-814, supersedes 60-1107, *supra*, or conflicts with it is not material in this case. We therefore leave the question open.

The unfair labor practices of which appellee complains consist of unlawful picketing and boycotting. G. S. 1955 Supp., 44-809, insofar as pertinent herein provides:

"It shall be unlawful for any person

. . . . . .

"(14) To engage in picketing by force and violence, or to picket in such a manner as to prevent ingress and egress to and from any premises, or to picket other than in a peaceable manner."

Assuming that the strike in the instant case was legal and that the appellants were entitled to exercise their right to picket peaceably, does the evidence support the conclusion of the trial court that the picketing was in contravention of the statute and *was not in a peaceable manner?* The evidence has been summarized heretofore in considerable detail and will not be repeated. As to the picketing profanity was used, the police were called by a neighbor lady on one occasion and all of the pickets used cameras for the purpose of photographing, or pretending to photograph, the customers and patrons of the appellee and appellee's employees. That the "photographing" was definitely calculated by appellants as a component part of the picketing is fully supported by the evidence. Pictures were taken by S. E. Smith, president of the appellant Union, which he identified in his testimony in chief. They disclose the application of professional "know-how." The photographs showing a customer ignoring a picket line, entering the store and also leaving the store with packages particularly identified with the picket, represent complete evidence. Likewise, a photo of the two employees beside an ElDorado Dairy truck replacing the striking drivers infers a Union purpose.

The sole purpose of taking pictures, or attempting to take them, was to intimidate the appellee, his employees, his customers and patrons so that they would refrain from patronizing the appellee or going about his place of business. In the long history of labor disputes resulting in violence and injury to persons, the public has naturally become very apprehensive of being identified with a labor

dispute. A Union having positive proof of record that they crossed a picket line generates fear. Photographing persons who cross a picket line is the kind of intimidation that no person desires in any community at any time. When we have a community such as the City of ElDorado and its environs, which is already a highly industrialized and unionized community, the outright effect of a threatened use of photographs becomes even more important to the individual and to the appellee.

By fear of exposure in the use of photographs appellants have committed a grievous wrong to the appellee and his customers and employees. It represents an invasion of one's right to privacy. The possibility that a person's photograph might later be used to identify him as a person unfriendly to organized labor, and therefore subject him to possible physical violence, was a threat as real and present as if the picket had threatened him with violence if he dared to cross the picket line. It is stated in 31 Am. Jur. Labor, §240, pp. 952 and 953, as follows:

". . . The law does not countenance any display that is the equivalent of force and intimidation, or of a disturbance of the peace, however laudable the motive or purpose of the strikers . . . Force threatened is the equivalent of force exercised . . . But even when the acts of the strikers, although unaccompanied by violence or threats, are such an annoyance to others as to amount to coercion or intimidation, they are unlawful."

Peaceful picketing has been justified under the constitutional guarantee of the right of free speech. It is a means of communication and as such it conveys the information of a labor grievance to the public. When the

picketing goes beyond this purpose it then becomes unlawful and is no longer entitled to protection as a constitutional guarantee of free speech. This point has been dealt with at some length in *Binder v. Local Union No. 685*, supra, where numerous cases of the United States Supreme Court are considered. Reference is made thereto without further elaboration.

Resort to intimidation and threatened use of force against the appellee's customers and patrons and against the appellee and his employees by the appellants went far beyond any right of the Union employees to strike and picket peaceably for the purpose of communicating their grievance to the public. These were unlawful acts of coercion. Though the original picketing may have been peaceful and for the lawful purpose of putting pressure on the employer by communicating the grievance of the employees to the public, where these purposes were intermixed with acts of coercion which were unlawful, the picketing in its entirety became tainted with the unlawful purpose. The purpose of this coercive picketing was to strangulate the appellee's business and it was no doubt the hope of the appellat (sic) Union that this would hasten appellee's recognition of the Union's demands. Coercive picketing is unlawful and contrary to the public policy expressed by the legislature of Kansas.

The appellants were successful in bringing about a secondary boycott of appellee's business. Three of the largest wholesale outlets for ElDorado Dairy products were lost and the evidence discloses that conditions were ripe for terminating the remaining four wholesale outlets. Mel

Chance was in ElDorado, Kansas, on the 2nd day of September, 1955, when he called at the Wynn-Warren Foodliner. This was the very day the temporary injunction was issued *ex parte*. What his activities for the remainder of the day would have been are, of course, speculative. But the evidence is clear that contact had been made with the remaining four grocers in ElDorado through their wholesale grocery distributor in Wichita at appellants' instigation. In our opinion the facts and circumstances indicated by the evidence presented in the record disclose a violation of G. S. 1955 Supp., 44-809a(1), on the part of the appellants.

A broad assumption has been made that the employees, Hodgens, Church and Grant, had the legal right to strike and that the appellants were entitled to picket peaceably. The factual statement of the case has been oversimplified in this respect. These questions are not free from doubt in the instant case. The assumptions upon which this opinion has been written have not been to the prejudice of appellants' rights herein, but the questions suggested by them we leave open for the reasons hereafter assigned.

G. S. 1955 Supp., 44-809, provides in part:

"It shall be unlawful for any person

"(1) To interfere with or prevent the right of franchise of any member of a labor organization. The right of franchise shall include the right of an employee to make complaint, file charges, give information or testimony concerning the violations of this act, or the petitioning to his union regarding any grievance he may have concerning his membership or employment, or the making known facts concerning such grievance or violations of law to any person, including public officials or the employer, and

his right of free petition, lawful assemblage and free speech."

G. S. 1955 Supp., 44-816, provides:

"Within sixty (60) days after the taking effect of this act, the state labor commissioner shall adopt rules and regulations governing the conduct and canvassing of elections for the selection of collective bargaining units, and by collective bargaining units relative to approval of all union agreements, *strikes*, walk outs, or cessation of work or continuation thereof. Such rules and regulations may be amended, revised, or supplemented from time to time as the state labor commissioner shall deem advisable or necessary. All such rules and regulations shall be filed in the office of the revisor of statutes as provided in article 4 of chapter 77 of the General Statutes of 1949, or acts amendatory thereof." (Emphasis added.)

The foregoing sections in the Kansas statutes were adopted by the legislature in 1955 and became effective on the 1st day of July, 1955. The appellee argues that appellant Smith first met the three recruited employees of the appellee on July 14, 1955, and secured an authorization card signed by each of said three employees, recognizing the right of the appellant Union and appellant Smith to bargain for them. That on July 23, 1955, after one personal contact by the appellant Smith with the appellee, the Union members and appellant Smith decided to strike and two days later on Monday, July 25, the strike followed. Appellee argues that the strike, therefore, was based upon the agreement of the employees and the appellant Smith and nothing else.

The appellee's position is that the statute was in effect; it contained a positive mandate and appellee would have

been in violation of the statute if he had attempted to recognize the Union as the bargaining agent of his employees prior to the time that it had been legally certified, as provided in said Act, and any strike called in contravention to the terms of said Act was illegal. Appellee argues the strike being illegal, all acts of the strikers to enforce their demands, including picketing, are also illegal and may properly be enjoined in an appropriate action for that purpose.

The appellant, S. E. Smith, testified that he knew the foregoing sections of the Kansas statutes became effective on the 1st day of July, 1955, and that the State Labor Commissioner had not adopted the rules and regulations provided in 44-816, *supra*, at the time he called the strike. This, apparently, was the basis upon which the trial court made some of its findings and upon which a portion of its judgment was founded.

In our opinion the evidence in the record is deficient in certain respects to properly determine these issues. Furthermore, it is apparent that consideration should be given to constitutional aspects of the last two quoted sections of the statutes. Briefing on this point has been inadequate. We therefore leave open the questions whether the three employees, Hodgens, Church and Grant, had the legal right to strike and whether appellants had the lawful right to picket the ElDorado Dairy in a peaceable manner.

Accordingly, the conclusions of the trial court set forth in the journal entry which read:

". . . that the strike was illegally called; that the defendant did not comply with the applicable Kansas statutes; . . ."

are vacated, set aside and held for naught.

The judgment of the trial court is modified to read that the appellants, specifically designated in the journal entry: "be and they are permanently enjoined and restrained:

"A. From intimidating or threatening the plaintiff and his nonunion employees by the use of photography or by any other unlawful means.

"B. From intimidating, harassing or threatening patrons of the plaintiff's business by the use of photography or by any other unlawful means.

"C. From any and all acts or conduct designed to boycott plaintiff's business.

"D. From picketing plaintiff's place of business."

Counsel for appellants argue that an injunction should not go beyond the requirements or be broader or more extensive than the case warrants. The foregoing modification of the lower court's judgment is designed to confine the injunction to the needs in this case. It may be contended that an injunction against picketing in this case will restrain the exercise of a constitutional right. Acts of appellants which in isolation are peaceful picketing may be a part of coercive picketing when entangled with unlawful intimidation and threats. The picketing in this case was set in a background of intimidation and unlawful coercive pressures. Under such circumstances it may justifiably be concluded that the momentum of fear

generated by past conduct and coercive pressures would survive even though future picketing might be wholly peaceful. This is particularly true of a community the size of ElDorado, Kansas, and its environs. We conclude that the permanent injunction against picketing in this case does not transcend constitutional guarantees. (*Drivers Union v. Meadowmoor Co.*, 312 U. S. 287, 61 S. Ct. 552, 85 L. Ed. 836.)

The judgment of the trial court as herein modified is affirmed.

APPENDIX D.

(Omitting captions and signatures)

OPINION DENYING A REHEARING.

Appeal from Butler district court, division No. 2, W. N. CALKINS, judge. Opinion denying a rehearing filed December 18, 1957. (For original opinion affirming as modified see 181 Kan. 898, 317 P. 2d. 817.)

Russel Cranmer, Payne H. Ratner, Louise Mattox, Payne H. Ratner, Jr., Dale B. Stinson, Jr., Cliff W. Ratner, William L. Fry, A. Wayne Murphy, Bernard V. Borst, D. Clifford Allison, and *Gerald D. Lasswell,* all of Wichita, for the appellants.

M. F. Litras, R. C. Woodward and *H. Pauline Woodward,* all of El Dorado, for the appellee.

The opinion of the court was delivered by

SCHROEDER, J.: Counsel for appellants filed a motion for rehearing, which consists largely of reargument of the points previously argued and considered by the court. It presents nothing which warrants a reconsideration of the case, and the motion is denied.

Counsel state, "This court's conclusion that appellants brought about a secondary boycott does not support paragraph C of the court's injunction wherein appellants are enjoined, not only from a secondary boycott, but also from primary boycott."

One of the issues upon which the opinion of this case was written concerned a secondary boycott denounced by G. S. 1955 Supp., 44-809a(1). Primary boycott was not

an issue in this case and paragraph C of the injunction is not to be construed as having any application to primary boycott, but rather to secondary boycott only.